Topics for Discussion

1. How does each district comply with statutory policy that juries be constituted by a fair cross-section of the community of the district wherein the court convenes?

2. Has implementation of the *Daubert* gatekeeper function resulted in diminution of the jury role in evaluating credibility of expert testimony?

3. How has *Blakely* affected sentencing in the 10th Circuit?

4. Is the precipitous decline in the number of civil jury trials directly related to success of programs mandating mediation?

US. Code
Jury Requirements

➜§ 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

➜§ 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

➜§ 1863. Plan for random jury selection

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall-

> **(1)** either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: *Provided, however,* That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be fixed by the district court plan at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title. The plan for the district of Massachusetts may require the names of prospective jurors to be selected from the resident list provided for in chapter 234A, Massachusetts General Laws, or comparable authority, rather than from voter lists.

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years.

(5)(A) except as provided in subparagraph (B), specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(B) specify that volunteer safety personnel, upon individual request, shall be excused from jury service. For purposes of this subparagraph, the term "volunteer safety personnel" means individuals serving a public agency (as defined in section 1203(6) of title I of the Omnibus Crime Control and Safe Streets Act of 1968) in an official capacity, without compensation, as firefighters or members of a rescue squad or ambulance crew.

(6) specify that the following persons are barred from jury service on the ground that they are exempt: (A) members in active service in the Armed Forces of the United States; (B) members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession; (C) public officers in the executive, legislative, or judicial branches of the Government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession, who are actively engaged in the performance of official duties.

(7) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chef judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(8) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

➜§ 1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, or the clerk under supervision of the court if the court's jury selection plan so authorizes, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and in any alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, or the clerk if the court's jury selection plan so provides, shall deem any person qualified to serve on grand and petit juries in the district court unless he-

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

Sentencing Plan Responsive to *Blakely*

Hon. Sven Erik Holmes
Northern District of Oklahoma

The Court will implement the following four-point plan going forward as a means of fully protecting each Defendant's Sixth Amendment jury trial rights as described in Blakely v. Washington.

1. This Court will only accept a plea of guilty accompanied by a Sixth Amendment waiver of jury that expressly applies to both guilt or innocence and to sentencing. If the Defendant does not desire to waive his or her Sixth Amendment rights in all respects, a jury trial on all issues will ensue. Such a waiver and consent to judicial fact-finding is contemplated by the Constitution, Blakely v. Washington and sound public policy.

2. For those cases resolved by a plea pursuant to such a comprehensive waiver, judicial fact-finding at sentencing will require that any adjustment or departure, both upward and downward, be based on facts established beyond a reasonable doubt. For such adjustments or departures, the United States must meet this burden of proof. The Court recognizes this may have significant consequences, particularly in the area of relevant conduct. Nevertheless, the Court believes the language in Blakely equating judicial fact-finding with jury fact-finding as a matter of Sixth Amendment jurisprudence, implicitly if not explicitly, requires this enhanced evidentiary standard. Moreover, experience tells us that most such sentencing adjustments are not difficult to establish beyond a reasonable doubt, but that it will simply require more time, energy, and effort to do so.

3. For those cases that go to trial, facts necessary to support relevant sentencing adjustments will be put to the jury on the verdict form to find beyond a reasonable doubt. A mechanism will be established whereby all parties have full notice of all such possible adjustments prior to trial. The Court will give the jury such instructions as are necessary and appropriate to make these findings of fact. The Court, having met with every jury over the last nine plus years, has great confidence in the jury's ability to address these issues fairly and effectively.

4. The Court anticipates that in some cases involving relevant conduct, evidence of such conduct may not be admissible because it may be of limited probative value in proving the crime charged and highly prejudicial. Only in the most unique case will the Court permit a bifurcated procedure whereby guilt or innocence is established in a first phase and relevant conduct is offered in a second phase. The Court suggests that in most cases that go to trial, since the United States hereafter must prove relevant conduct to a jury beyond a reasonable doubt in any event, the United States should consider simply including any such allegations as part of the crime or crimes being charged.

This four-point plan will maintain the workability and fairness of the federal guideline system, while addressing the legitimate concerns expressed in Blakely that in certain instances judicial fact-finding by a lower standard of proof is

inconsistent with a Defendant's Sixth Amendment rights. Moreover, only time will tell whether and to what extent relevant conduct wil1 continue to play a significant role in federal sentencing after Blakely. But, in this regard, it should be noted that most everyone involved in our criminal justice system, at least to some extent, has concerns about the manner and degree to which relevant conduct affects federal sentencing under the current system. In judgement of this Judge, the federal guidelines, as applied under the terms of this four-point plan, are clearly constitutional. As the Supreme Court noted in Blakely, the purpose of that opinion was not to eradicate sentencing guideline systems, but to insure that they are applied in a manner consistent with each Defendant's Sixth Amendment rights.

Settlement Conference
Local Rules

District of New Mexico
Northern District of Oklahoma
District of Utah

West's New Mexico Rules Annotated Currentness
Federal Court Rules
United States District Court for the District of New Mexico
Local Civil Rules of the United States District Court for the District of New Mexico
111. Pleadings, Motions and Other Papers

➜ RULE 16. PRETRIAL PROCEDURES

16.1 Initial Pretrial Report. An Initial Pretrial Report form is available from the Clerk. The parties must complete the Initial Pretrial Report during their Fed.R.Civ.P. 26(f) meet-and-confer conference. A consolidated report, signed by the parties and with dates left blank, must be sent to the assigned Magistrate Judge at least five (5) calendar days before the scheduling conference. Any deadlines established in the Initial Pretrial Report will govern actions in pretrial matters once the report is entered by the Court. Any modification of the deadlines, whether or not opposed, will require a showing of good cause and Court approval.

16.2 Settlement Conferences.

(a) In every civil case the parties must participate in a settlement conference with a Judge unless otherwise ordered by the Court. Cases excepted from this rule are listed under D.N.M.LR-Civ. 16.3.

(b) In every bankruptcy adversary proceeding filed in Bankruptcy Court, the parties must participate in a settlement conference with members of the bankruptcy facilitation panel unless otherwise ordered by the Bankruptcy Court.

(c) For each party, at least two persons must attend settlement conferences:

- the attorney who will try the case; and
- the party or designated representative with final settlement authority, other than an attorney of record.

(d) A request to be excused must be made in writing to the Court at least five (5) calendar days before the conference.

(e) Evidence of settlement offers made, and of statements made, at the settlement conference, regardless of whether made in written, oral or graphic form, will be inadmissible as provided in Fed.R.Evid. 408. Statements which are made by any party to the Judge who is conducting the settlement conference, and which are identified

by that party as confidential, will not be disclosed by the Judge to any other party. The Judge who is conducting the settlement conference may not reveal to the trial Judge any information about offers made, or about statements made, by any party at the settlement conference, other than whether the case was or was not settled.

(f) Within five (5) days of notice of assignment of a member of the bankruptcy facilitation panel to facilitate an adversary proceeding in Bankruptcy Court, any party may move the Court to disqualify the panel member based on the standards set forth in 28 U.S.C. § 455.

WEST'S OKLAHOMA COURT RULES AND PROCEDURE
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
LOCAL CIVIL RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OKLAHOMA

Current with amendments received through 11/1/2003

LOCAL RULE 16.2 SETTLEMENT CONFERENCES

(a) Purpose. The purpose of the settlement conference is to permit an informal discussion between the attorneys, parties, and the settlement judge on every aspect of the case bearing on its settlement value in an effort to resolve the matter before trial.

(b) Referral and Scheduling the Settlement Conference. All civil cases set on a trial docket are automatically set for settlement conference before the settlement judge. Also the Court may, upon its own motion or on the request of any of the parties, set a settlement conference at any practicable time. Form settlement conference orders shall be available from the Court Clerk. The terms of the settlement conference order govern the procedures for the settlement conference. The assigned district judge may, in his or her discretion, require that the parties pay for a settlement conference in any reasonable manner or amount.

(c) Settlement Judges. A district judge other than the judge assigned to the case, a

magistrate judge, or an adjunct settlement judge designated by the Court, will normally preside at the settlement conference. The settlement judge will take no part in adjudicating the case subsequent to the settlement conference. Adjunct settlement judges shall be selected by the Court from among members of the bar in good standing and chosen based upon their expertise, experience, actual and apparent impartiality, reputation for fairness, training, and temperament. They shall be invited to serve without compensation and commit to conduct a minimum of six settlement conferences per year. Any party or counsel of record may move to disqualify the assigned settlement judge pursuant to 28 U.S.C. § 455, other applicable law or professional responsibility standards. No adjunct settlement judge may be called as a witness, except as requested by a judge of this Court. In that instance, the adjunct settlement judge shall not be deposed, and shall testify as the Court's witness. In cases where the settlement effort is expected to be extensive, or in connection with discovery matters, the Court may appoint an adjunct settlement judge as a special project settlement or discovery judge, and order the parties to pay for his or her time at a reasonable hourly rate. Such payment shall be apportioned between the parties as agreed, or by the Court on an equitable basis.

(d) Attendance Requirements. The lead attorney who will try the case for each party shall appear, and shall be accompanied by one with full settlement authority. The latter will be the parties if natural persons, or representatives of parties which are not natural persons, but may not be counsel (except in-house counsel) or a person who is not directly or actively associated with the party or parties. Other interested entities such as insurers or indemnitors shall attend and are subject to the provisions of this Rule. Governmental entities and boards shall send a representative and counsel who, together, are knowledgeable about the facts of the case and the governmental unit's or board's position, and have, to the greatest extent feasible, authority to settle.

Only the settlement judge may excuse attendance of any attorney, party or party representative. Any party excused from appearing in person shall be available to participate by telephone, if required. Failure to attend the settlement conference or failure to cooperate fully, may result in the imposition of sanctions in accordance with LCvRl6.1 (b)(2) and Fed. R. Civ. P. 16(f).

(e) Governmental Entities. In the event a governmental entity which is a party determines that it will be unable to provide a representative with full settlement authority at the settlement conference, the governmental entity shall promptly move for leave to proceed with a representative with limited authority. The motion shall be filed and delivered to the settlement judge no later than eleven (11) days prior to the conference and shall contain: (1) the reasons which make it impracticable for a party's representative to appear with full settlement authority; (2) a detailed description of the limited authority to be exercised at the conference; and (3) alternative proposals by which full authority may be exercised at or subsequent to the conference.

Upon consideration of the motion, the settlement judge may allow the governmental entity to appear with limited authority or may, notwithstanding the motion, require appropriate persons to appear as may be necessary to have full settlement authority at the conference. Any adjunct settlement judge may defer such determination to the magistrate judge or district judge then supervising the adjunct settlement judge program.

(f) Submission of Written Settlement Conference Statements. A settlement statement shall be submitted to the settlement judge and served on opposing counsel at least seven (7) days preceding the date of the settlement conference unless otherwise ordered by the Court. It shall concisely summarize the parties' claims/defenses/counterclaims, etc., the parties' views concerning factual issues, issues of law, liability, damages or relief requested. The statement shall not exceed five (5) pages in length, shall conform to the format requirements set forth in the Local Rules, but shall not be filed in the case or made part of the Court file.

(g) The Settlement Conference Process. Prior to settlement conference, the parties shall discuss settlement with their respective clients and opposing counsel (or pro se parties) so that the issues and bounds of settlement have been explored in advance of the settlement conference.

The parties, their representatives and attorneys are required to be completely candid with the settlement judge so that the judge may properly guide settlement discussions. Pertinent evidence to be offered at trial, documents or otherwise, may be brought to the settlement conference for presentation if particularly relevant.

(h) Authority of Settlement Judge. The settlement judge may excuse attendance of any attorney, party or party's representative; meet jointly or individually with counsel, alone or with parties or persons or representatives interested in the outcome of the case without the presence of counsel; and issue such other and additional requirements as shall seem proper, including follow-up sessions telephonically or otherwise, in order to expedite an amicable resolution of the case.

(i) Confidentiality. The settlement judge, all counsel and parties, and any other persons attending the settlement conference shall treat as confidential all written and oral communications made in connection with or during any settlement conference. Neither the settlement conference statements nor communications during the conference with the settlement judge may be used by any party in the trial of the case. No communication relating to or occurring at a court-ordered settlement conference may be used in any aspect of any litigation except proceedings to enforce a settlement agreed to at the conference.

(j) Conclusion of the Settlement Conference. At the conclusion of the settlement conference, the settlement judge shall notify the Court whether the case did or did not settle. If the case settled, counsel shall prepare and file the appropriate dismissal or closing papers.

(k) Other Alternative Methods. The Court may, in its discretion, set any civil case for summary jury trial, mini-trial, executive summary jury trial (summary jury trial where chief executive officers of corporate parties

WEST'S UTAH RULES OF COURT
RULES OF PRACTICE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Current with amendments received through 10-01-03

DUCivR 16-3. SETTLEMENT CONFERENCES

(a) Authority for Settlement Conferences. In any case pending in this court, the assigned judge may require, or any party may at any time request, the scheduling of a settlement conference.

(b) Referral of Cases for Purposes of Conducting a Settlement Conference. Under Fed.R.Civ.P. 16(a)(5) and (c)(9) and 28 U.S.C.§ 636(b)(l), the district judge to whom the case has been assigned for trial may refer it, for the purpose of undertaking a settlement conference, either to another district judge or, on consultation with the parties and their counsel, to a magistrate judge.

(c) Settlement Proceedings. The settlement judge or magistrate judge may require the presence of the parties and their counsel, may meet privately from time to time with one party or counsel, and may continue the settlement conference from day to day as deemed necessary. The settlement judge or magistrate judge may discuss any aspect of the case and make suggestions or recommendations for settlement. Counsel for each party to the settlement conference must ensure that a person or representative with full settlement authority or otherwise authorized to
make decisions regarding settlement is available in person or by telephone during the settlement conference.

(d) Confidential Nature of Settlement Proceedings. The settlement conference will be conducted in such a way as to permit an informal, confidential discussion among counsel, the parties, and the settlement judge or magistrate judge. The settlement judge or magistrate judge may require settlement memoranda to be submitted either with or without service upon the other parties and counsel participating in the settlement conference, but such memoranda must neither be made a part of the record nor filed with the clerk of court. The settlement judge or magistrate judge may not communicate to the trial judge to whom the case has been assigned the confidences of the conference, except to report whether or not the case has been settled. Such report must be made in writing, with copies to the parties and their counsel, within a reasonable time following the conference or within such time as the trial judge may direct. If the case does not settle, no oral or written communication made during the settlement conference may be used in the trial of the case or for any other purpose.

[Effective September 1, 1997. J
U. S. Dist. Ct. Rules D.Utah, Civil DUCivR 16-3
UT R USDCT CW DUCivR 16-3